

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

LONNIE COOPER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 19-1356T (Judge Davis)
	)	
THE UNITED STATES,	)	Filed: May 9, 2023
	)	
Defendant.	)	

**OPINION AND ORDER**

On September 5, 2019, Plaintiff Lonnie Cooper filed this action for refund of a filing penalty assessed against him due to the late filing of his 2014 tax return. Before the Court is the Government’s Motion to Dismiss under Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (“RCFC”) for lack of subject-matter jurisdiction. For the reasons discussed below, the Court has jurisdiction over Plaintiff’s Complaint. Additionally, the Government has not demonstrated in the alternative that the Complaint fails to state a claim. Accordingly, the Government’s Motion to Dismiss is **DENIED**.

**I. BACKGROUND**

**A. Factual History**

Mr. Cooper seeks to recover a \$95,117.50 late-filing penalty assessed in connection with his 2014 tax return. Pl.’s Compl. ¶¶ 1, 27–29, ECF No. 1. According to the Complaint, Mr. Cooper’s Certified Public Accountant (“CPA”) timely requested on Mr. Cooper’s behalf an extension of the filing deadline to October 15, 2015. *Id.* ¶ 13. In the interim, Mr. Cooper remitted an estimated tax payment of \$630,550.00, resulting in an overpayment of the taxes owed for the 2014 tax period. *Id.* ¶ 14. As the October 2015 filing date approached, Mr. Cooper became concerned that his CPA would not timely file his 2014 tax return due to personal family issues the

CPA was experiencing. *Id.* ¶¶ 15–16. The CPA advised Mr. Cooper that “there would not be a late filing penalty” because his 2014 tax obligation had already been fully paid prior to the extended filing deadline. *Id.* ¶ 14. Due to alleged issues and delays on the part of the CPA, Mr. Cooper’s 2014 tax return was filed eight months late, in June 2016, and the IRS assessed a late filing penalty under I.R.C. § 6551(a)(1). *Id.* ¶¶ 17–18. The IRS collected the penalty from Mr. Cooper’s overpayment of his 2014 tax obligation. *See* Ex. C to Pl.’s Compl. at 1, ECF No. 1-3.

On August 30, 2016, Mr. Cooper, through his tax attorney, filed a Form 843 (Claim for Refund and Request for Abatement) requesting an abatement of the late filing penalty assessed for the 2014 tax year. ECF No. 1 ¶ 19. The Complaint purports to attach a true and accurate copy of the claim for refund and request for abatement. *See* ECF No. 1-3. Mr. Cooper’s tax attorney signed the Form 843 as the preparer, and also signed on Plaintiff’s behalf under penalties of perjury. *Id.* at 1. The Complaint does not allege that Mr. Cooper authorized his attorney to sign the Form 843, nor does the Complaint include a copy of a Form 2848 (Power of Attorney and Declaration of Representative).

On January 5, 2017, the IRS denied Mr. Cooper’s request for abatement. ECF No. 1 ¶ 20; Ex. D to Pl.’s Compl. at 1, ECF No. 1-4. Mr. Cooper, through his tax attorney, filed an appeal on March 6, 2017, which the IRS denied via letter dated September 5, 2017. ECF No. 1 ¶¶ 21–22; Ex. E to Pl.’s Compl. at 1, 4, ECF No. 1-5. The IRS addressed correspondence related to the denial of Mr. Cooper’s claim for refund and subsequent appeal to Mr. Cooper’s tax attorney. ECF No. 1-4 at 1; Ex. F to Pl.’s Compl. at 1–2, ECF No. 1-6.

## **B. Procedural History**

Mr. Cooper filed suit in this Court on September 5, 2019. *See* ECF No. 1. The Government filed its Answer to the Complaint on December 4, 2019. Def.’s Answer, ECF No. 7. Following the completion of fact discovery, the Government advised the Court that it had identified a

potential jurisdictional defect that it anticipated raising via dispositive motion. Joint Status Report at 1, ECF No. 17. On May 13, 2022, the Government moved to dismiss the Complaint pursuant to RCFC 12(b)(6). Def.’s First Mot. to Dismiss, ECF No. 21. The Government argued that Mr. Cooper did not “duly file” his refund claim as required by I.R.C. § 7422(a) because he did not sign the Form 843 under penalties of perjury and failed to submit a Form 2848 along with his refund claim authorizing his tax attorney to sign and verify the claim on his behalf. *Id.* at 1, 4. Relying on the recent decision in *Brown v. United States*, 22 F.4th 1008 (Fed. Cir. 2022), the Government contended that these defects warranted dismissal with prejudice for failure to state a claim upon which relief may be granted. *Id.* at 3. It acknowledged, however, that in discovery Mr. Cooper denied failing to submit a Form 2848 with his refund claim and produced what he claimed to be “a true and correct copy of the documents filed with the IRS Form 843,” including a Form 2848 signed August 11, 2016. *Id.* at 8; Ex. 4 to Def.’s First Mot. to Dismiss at 55, 59–62, ECF No. 21-1. Mr. Cooper responded to the Government’s motion on June 10, 2022, producing another copy of the Form 2848, dated August 11, 2016, which was stamped as received by the IRS on March 13, 2017, as part of Mr. Cooper’s appeal. Pl.’s Resp. to Def.’s First Mot. to Dismiss at 1, 8, EFC No. 22; Ex. 1 to Pl.’s Resp. at 70–71, ECF No. 22-1.

On July 5, 2022, the Government withdrew its Rule 12(b)(6) motion, stating that upon further research it believed the defects in Mr. Cooper’s refund claim were jurisdictional. Def.’s Mot. to Withdraw at 1, ECF No. 24. The Government filed the instant motion on July 8, 2022. Def.’s Second Mot. to Dismiss, ECF No. 25. The motion raises the same grounds for dismissal—*i.e.*, that Mr. Cooper’s refund claim was not “duly filed” due to his failure to comply with the signature verification requirements—but, contrary to its initial motion, the Government relies on circuit precedent preceding *Brown* to support a jurisdictional argument. *Id.* at 1, 12–15. The

Government now contends that *Brown* is not binding because the *Brown* panel could not overrule prior panel decisions finding that § 7422(a) sets forth jurisdictional prerequisites to filing suit. *Id.* at 18–21.

Mr. Cooper filed his opposition on August 4, 2022. Pl.’s Resp. to Def.’s Second Mot. to Dismiss, ECF No. 26. He does not contest the Government’s position that any filing defects related to his refund claim raise a jurisdictional issue. *Id.* at 20. But Mr. Cooper continues to dispute claims that he failed to submit the Form 2848 alongside his Form 843 at initial filing and that the Form 2848 does not authorize his tax attorney to sign and verify the refund claim on his behalf. *Id.* at 1, 7–10. He also argues that the IRS waived any non-compliance with the signature verification requirements by accepting and processing his refund claim and appeal. *Id.* at 18–20.

### **C. Standard of Review**

“Subject-jurisdiction is a threshold matter; without it, ‘the only function remaining to the court is that of announcing the fact and dismissing the [case].’” *Health Republic Ins. Co. v. United States*, 161 Fed. Cl. 510, 517 (2022) (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1868)). On a Rule 12(b)(1) motion, “a court must accept as true all undisputed facts asserted in the plaintiff’s complaint and draw all reasonable inferences in favor of the plaintiff.” *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011); *Estes Express Lines v. United States*, 739 F.3d 689, 692 (Fed. Cir. 2014). However, the Court is not confined to the “face of the pleadings” when jurisdictional facts are in dispute, and it may review evidence presented outside the pleadings to resolve factual questions necessary to a finding on jurisdiction. *Griffin v. United States*, No. 21-2307T, 2022 WL 1101817, at \*3 (Fed. Cl. Apr. 13, 2022); *Mark Smith Const. Co. v. United States*, 10 Cl. Ct. 540, 541 n.1 (1986). If the Court determines that the plaintiff has failed to meet “the burden of establishing the court’s jurisdiction over its claims by a preponderance of the evidence,” the Court must dismiss the case. *Trusted Integration*, 659 F.3d at 1163.

## II. DISCUSSION

### A. Following Recent Binding Precedent, Any Signature Verification Defect in Mr. Cooper's Refund Claim Does Not Raise a Jurisdictional Question.

As an initial matter, the Court must determine whether the Government's arguments are properly raised by a motion to dismiss for lack of subject-matter jurisdiction.<sup>1</sup> The Government argues that verification of a claim for refund is a jurisdictional prerequisite under I.R.C. § 7422(a). ECF No. 25 at 12. According to the Government, because Mr. Cooper failed to properly verify his refund claim under penalties of perjury in compliance with the statutory and regulatory requirements, his claim was not “duly filed” and thus the Court lacks jurisdiction. *Id.* at 17–18. Although it acknowledges that the United States Court of Appeals for the Federal Circuit recently held in a precedential decision that the “‘duly filed’ requirement in § 7422(a) is more akin to a claims-processing rule than a jurisdictional requirement,” the Government claims the *Brown* decision is not binding. *Id.* at 19 (quoting *Brown*, 22 F.4th at 1011); *see id.* at 20–23. It urges the Court to apply prior panel decisions holding the contrary.

Section 7422(a) provides:

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, *until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.*

I.R.C. § 7422(a) (emphasis added). The Supreme Court has held that § 7422(a) waives sovereign immunity from refund actions against the United States only when a taxpayer seeking refund has filed a timely refund claim with the IRS prior to filing suit. *United States v. Dalm*, 494 U.S. 596,

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<sup>1</sup> The Court notes that Plaintiff does not dispute that the issue raised is jurisdictional; nonetheless, the Court must independently address its own jurisdiction. *See St. Bernard Parish Gov't v. United States*, 916 F.3d 987, 992–93 (Fed. Cir. 2019).